

MALAYSIA SMELTING CORP. BHD.

v.

**KESATUAN KEBANGSAAN PEKERJA-PEKERJA PERUSAHAAN
PELEBORAN LOGAM, BUTTERWORTH**

HIGH COURT MALAYA, PULAU PINANG

MOHAMED DZAIDDIN J

[ORIGINATING SUMMONS NO. 25-29-91]

17 APRIL 1992

ADMINISTRATIVE LAW: *Certiorari application to quash decision of the Industrial Court - Whether the Court had committed an error of jurisdiction in holding the claimant/respondent's dismissal to be without just cause or excuse - Whether the Court had further acted in excess of jurisdiction by taking into consideration irrelevant matters and failing to properly consider relevant matters.*

LABOUR LAW: *Dismissal - Allegation of excessive medical leave taken by claimant/respondent - Authorised medical leave - The bona fides of the certificates not in question - Whether claimant/respondent's medical leave nevertheless amounts to a misconduct.*

LABOUR LAW: *Misconduct - Whether alleged misconduct recognised by the law - Whether the Industrial Court had addressed itself on the proper issues advanced against the claimant/respondent - A matter of construing the charge - Whether the Industrial Court had addressed itself to the essential ingredients in the charge.*

WORDS AND PHRASES : "Misconduct".

The charge against the claimant/respondent (R) reads as follows:

That you have persistently taken excessive medical leave for the last six years in order not to come to work and indicating unwillingness to perform your contractual duties and obligation which is contrary to the expected performance as per your contract of employment with the Company. Due to your persistently high medical absences, your rate of absences for the last six years are as follows...

R was dismissed after being found guilty at the domestic inquiry. But in a reference to the Industrial Court under s. 26(2) of the Industrial Relations Act 1967, the dismissal was found to be without just cause or excuse. It held that the taking of excessive medical leave, if supported by *bona fide* medical certificates, is an unknown misconduct in common law, statutory law or industrial law. The collective agreement of the applicant (M) was also examined and the Court found that the prohibition "taking excessive medical leave" was not stipulated either in the agreement nor in the contract of service.

M applied by way of originating motion for an order of *certiorari* to have the award in favour of R quashed.

Held:

[1] The Court had misdirected itself by misconstruing the charge. The charge had two limbs and the Court had only considered the first limb viz. that R had persistently taken excessive medical leave. The second limb was essential to the allegations advanced against R in that it qualified the first limb so that the essence of the charge was that R persistently took excessive medical leave in order not to come to work and this showed that he was not willing to perform his duties as per his contract of employment.

a [2] Misconduct means improper conduct. Such conduct of R's amounts to misconduct of a serious nature and undermines the very crux of the employer-employee relationship, the spirit of the collective agreement and industrial relations as a whole.

b [3] Although the collective agreement did not specify which offences constituted "misconduct", Article 35 set out the disciplinary procedure to be followed in the event of misconduct. It was common ground that procedure had been followed as regards R's dismissal.

[4] The Court had committed an error of law and acted in excess of jurisdiction when it failed to construe the charge against R in its proper frame.

[Award of the Industrial Court quashed. Costs of present application borne by respondent.]

c **Award referred to:**
Dunlop Malaysia Industries Employees Union v. Dunlop Malaysian Industries Bhd. Award No. 212/81 (*Industrial Court of Malaysia Case No. 185/1980*) (**fol**)

Cases referred to:

International Sport Co. Ltd. v. Thomson [1980] 1 RLR 340 (**fol**)

Rolls-Royce Ltd. v. Walpole [1980] 1 RLR 343 (**fol**)

d *Enesty Sdn. Bhd. v. Transport Workers Union & Anor.* [1986] 1 MLJ 18 (**fol**)

Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 CLJ (Rep) 298 (**cons**)

Goon Kwee Phoy v. J & P Coats (M) Bhd. [1981] 2 MLJ 129 (**cit**)

Legislation referred to:

Industrial Relations Act 1967, ss. 26(2), 30(5), (5A)

e **Other source referred to:**

The Shorter Oxford English Dictionary

For the applicant - N. Sivabalah; M/s. Shearn Delamore & Co.

For the respondent - N. Shanmugam; M/s. Shan & Gooi

JUDGMENT

f **Mohamed Dzaidin J:**

The issues in this application for an order of *certiorari* to quash the decision of the Industrial Court ("the Court") Award No. 148/91 are quite straightforward, namely, whether the charge for which the claimant was found guilty by the applicant on 6 February 1988 was a misconduct known to industrial law, common law or statutory law and if so whether the Court had committed an error in jurisdiction when it held that the claimant's dismissal was without just cause or excuse. Secondly, did the Court act in excess of its jurisdiction when it failed to properly consider the charge made out against the claimant by the applicant but instead relied on irrelevant matters which were not relied upon by the applicant.

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The facts of the case have been concisely set out in the award of the Chairman dated 16 May 1991 (ARH-9) in lampiran 1). However, in order to answer the above posers, I need to highlight some of the material facts. The claimant was an employee of the applicant since 1968 and his last job was as a furnace labourer in the production department. On 7 February 1988, he was dismissed from his job because of excessive medical leave taken by him over a period of time between the years 1982 to 1987. The rate of his absences from work appeared in the charge. From the list of the types of medical problems of the claimant, it appeared that most of the illnesses were minor in nature. It is noted that in 1987 the claimant met with a motor accident and was hospitalized as a result of which he was given 43 days medical leave.

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The balance of 40 days was due to ordinary sickness. In August 1985 he was examined by the applicant's doctor where he was certified fit for work. In view of his excessive medical leave in 1985, the applicant issued a show-cause letter to the claimant in January 1986 asking him to give a written explanation regarding his excessive medical leave in 1985. In 1986 he was also required to present himself before a counselling panel where he was advised not to abuse the medical facilities and that he should improve his attendances at work. Further counselling took place in 1987. However, despite such counselling, he continued to be absent on medical leave. He was further advised to adopt a positive attitude in his work.

The applicant, being unhappy with the claimant as he had not shown any improvement in his work, finally issued the show-cause letter requiring the claimant to give a written explanation why a disciplinary action should not be taken against him. The claimant responded and gave his reasons and maintained that no disciplinary action should be taken against him as he was entitled as of right to medical leave under Article 28 of the collective agreement and under the law. The applicant was not satisfied with the claimant's explanation and on 22 February 1988 held a domestic inquiry for the claimant to answer the following charge:

That you have persistently taken excessive medical leave for the last six years in order not to come to work and indicating unwillingness to perform your contractual duties and obligation which is contrary to the expected performance as per your contract of employment with the company. Due to your persistently high medical absences, your rate of absences for the last six years are as follows:

- 1982 - 27% of available mandays per year;
- 1983 - 23% of available mandays per year;
- 1984 - 21% of available mandays per year;
- 1985 - 25% of available mandays per year;
- 1986 - 17% of available mandays per year;
- 1987 - 42% of available mandays per year;

At the end of the inquiry the claimant was found guilty as charged and was recommended by the board of inquiry to be dismissed. By a letter dated 6 February 1988, he was informed of his dismissal with effect from 7 February 1988. In a reference to the Court under s. 26(2) of the Industrial Relations Act 1967, it found that the claimant was dismissed without just cause or excuse.

Considering the above charge in the light of the first question, there are two main ingredients in the charge. The first ingredient is that the claimant for the years 1982 to 1987 had persistently taken excessive medical leave. This allegation is supported by the rate of absences shown in the charge. The second ingredient or limb of the charge is "in order not to come to work **and** indicating unwillingness to perform your contractual duties and obligations which is contrary to the expected performances as per your contract of employment with the company." Clearly, the second ingredient is crucial, and indeed, the essence of the applicant's case, in determining whether or not the charge discloses a misconduct in industrial law.

From the award of the Court, it seems clear to me that its decision was based only on the first limb of the charge without considering the second ingredient. This is borne out by the Chairman's own words at p. 7 as follows:

The charge against the claimant for which he was found guilty and dismissed is for misconduct of persistently taking **excessive medical leave** in 1982 to 1987.

- a** In the opinion of the Court, “Logically, absence with leave is not a misconduct. The taking of excessive medical leave is an unknown misconduct, it is unknown in common law and statutory law or industrial law. It would be misconduct if the taking of excessive medical leave is based on false medical certificates. It would then be “absence without leave.” It further held that the prohibition of “taking excessive leave” is not a term of the collective agreement nor was it in the contract of service, the breach of which disciplinary action could be taken. The Court, after examining the evidence arrived at the following decision:
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The Court is of the finding that the charge does not disclose any misconduct known in common law or statutory law or Industrial Law and neither was it a breach of the terms of the collective agreement or the contract of service.

- c** With respect, in my opinion, the Court has misdirected itself by misconstruing the charge when it deliberated only on the first ingredient. It failed entirely to give due and proper consideration to the second and crucial ingredient, namely, “in order not to come to work and indicating unwillingness to perform your contractual duties and obligation which is contrary to the expected performance as per your contract of employment with the company”. The second ingredient is essential to the charge because when the charge is read as a whole it qualifies the first ingredient in that the reason for persistently taking excessive medical leave was not to come to work and indicative of his unwillingness to perform his duties under the contract of employment. Taking of excessive medical leave supported by authorised medical certificates may not be wrong in law or may not contravene the contract of employment. But, taking of excessive medical leave in order not to come to work and indicating unwillingness to perform his duties under the contract of service must surely amount to an improper conduct of a serious nature. It is a misconduct which undermines the very basis of employer-employee relationship, the spirit of the collective agreement and industrial relations as a whole. Here, lies the crux of the “offence” of misconduct of the claimant. Misconduct simply means improper conduct (*The Shorter Oxford English Dictionary*).
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- f** The three cases cited by the applicant's representative before the Court seem to support the above proposition that is considering the charge as a whole there exists an offence of misconduct for which an employee may be charged. The facts in each case showed the high level of medical leave taken by the employee. In Award No. 212/81 (Industrial Court of Malaysia Case No. 185/1980), the claimant was charged for taking excessive medical leave from various clinics which indicated his unwillingness to perform the duty that he was required to perform under the contract of employment. The union contended that the claimant's dismissal was unjustified and against the principles of natural justice. The Court found the dismissal was fair and for just cause. It observed that the union throughout took the unwavering stand that the claimant was not guilty of any offence as he was on authorized medical leave which if excessive was nevertheless in no contravention of any regulation or statute. It failed, however, to consider the other aspect of the charges in that the excessive medical leave was taken by the claimant with the intention of not performing his duties.
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- h** In *International Sports Co. Ltd. v. Thomson* [1980] 1 RLR 340, the respondent employee was dismissed for persistent absenteeism. For the last 18 months of her employment she was absent on average for about 25% of the time and most of her absences were covered by medical certificates. It should be noted that in this case “persistent absence and lateness beyond agreed levels” was a class 11 offence under the company's disciplinary procedure. The respondent was dismissed summarily and an Industrial Tribunal found this dismissal unfair. On appeal, the Employment Appeal Tribunal allowed the appeal and substituted a
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finding of fair dismissal. The EAT recognized that the appellant had a code of disciplinary procedure which was accepted by the respondent's union with regard to the classes of offences. It found that the employee had an unacceptable level of intermittent absence due to minor ailments, which is a class 11 offence under the disciplinary procedure. **a**

Similarly, in *Rolls-Royce Ltd. v. Walpole* [1980] 1 RLR 343, the EAT by a majority allowed the appeal of the company and substituting a finding of fair dismissal against the employee because of his poor attendance record. During the last three years of his employment his rates of absence were 44%, 55% and 44% and almost all these absences were certified by a doctor to be due to sickness or injury. **b**

In the present case, I concede that the 1987 collective agreement between the company and the union does not stipulate the classes of "offences" which constitute misconduct. However, Article 35 provides the disciplinary procedure to be followed by the company in the event of misconduct, indiscipline, inefficiency or unsatisfactory performance of an employee. It is common ground that the above procedure was followed by the applicant. **c**

Therefore, for the above reasons, in my judgment, the Court had misdirected itself on the charge and was wrong in law in coming to the conclusion that the charge did not disclose any misconduct known in common law, or industrial employment and neither was it a breach of the contract of service. It follows that if there is an error of law on which the award was founded, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction (*Enesty Sdn. Bhd. v. Transport Workers Union & Anor.* [1986] 1 MLJ 18 SC). **d**

It was contended by Encik Shanmugum, for the respondent that even if there was an error with respect to the charge, the Court should be given a wide latitude to decide the reference. Counsel relied on s. 30 of the Act and the Supreme Court decision in *Wong Chee Hong v. Cathay Organization (M) Sdn. Bhd.* [1988] 1 CLJ (Rep) 298. Sub-section (5) and (5A) of s. 30 appear to confer on the Court the latitude mentioned by counsel. In the case of *Wong Chee Hong*, it appears to uphold the principle that so long as the Court directed itself properly in law as to its jurisdiction, its finding and therefore its award must stand unassailable. In as much as I am bound by the above principle, in the instant case I am fully satisfied that the Court has acted in excess of its jurisdiction. **e**

Next, the answer to the second poser which I raised earlier can be found at p. 9 of the award. The Court in handing down its award took into consideration the question of medical certificates and malingering. It is clear to me that these two issues did not form the bases of the applicant's complaint against the claimant. It is common ground that the applicant never disputed that the claimant's absences from work were supported by medical certificates. Hence, the *bona fide* of these certificates is not in issue. So also the issue of malingering. Perhaps it is appropriate here for me to quote the words of Raja Azlan Shah CJ (Malaya) (as he then was) in *Goon Kwee Phoy v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129 at p. 136: **f**

Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that Court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the Court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employer or find one for it. **g**

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a Therefore, in my opinion, it is wrong for the Court to have addressed itself on these two matters in coming to its finding that the claimant was dismissed without just cause or excuse. It has failed to address itself on the issue advanced by the applicant that the taking of excessive medical leave was in order not to come to work and indicative of unwillingness to perform the claimant's contractual duties under his contract of employment with the applicant.

b Accordingly, the Court was wrong in law in reaching the conclusion based on reasons not relied on by the applicant.

For the reasons stated above, I thereby make an order that this Award No. 148/91 be removed into this High Court to be quashed. The respondent shall bear the costs of these proceedings.

Also found at [1992] 3 CLJ 1722

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